80-1343

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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AERONAUTICAL RADIO, INC., and
AIR TRANSPORT ASSOCIATION OF AMERICA,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Courts of Appeals lack jurisdiction to review a decision by the Federal Communications Commission refusing to reject a tariff filing withdrawing a bulk service offering where (a) no supporting cost data have been filed, (b) the tariff has not been made subject to agency suspension, hearing, or monitoring, (c) no remedy is available to protest the discontinuance of the service as a result of the tariff filing, and a complaint proceeding to challenge existing rates for other services would be ineffectual, and (d) the agency has ruled with finality that the tariff filing presents "no question of lawfulness to investigate."

2. Whether, in the comprehensive regulatory scheme of the Communications Act of 1934, a gap exists between Section 204 of the Act which protects the public against unjustified rate increases and Section 214 which protects against reduction or impairment of service, thereby permitting a carrier unilaterally to terminate without review a long-standing, self-supporting bulk communication service without any showing of public convenience and necessity, without any supporting cost data or other demonstrated justification, and without regard to the impact of such action on bulk users or the public interest.

PARTIES TO THE PROCEEDING

The following were the parties in the proceeding in the United States Court of Appeals for the District of Columbia Circuit whose judgments are sought to be reviewed:

Aeronautical Radio, Inc.
Air Transport Association of America
American Broadcasting Companies, Inc.
American Newspaper Publishers Association
American Telephone and Telegraph Company
The Associated Press
CBS, Inc.
Commodity News Services, Inc.
Consolidated Rail Corporation
Dow Jones & Co., Inc.
Federal Communications Commission
General Electric Company
Microwave Communications, Inc.
National Broadcasting Company, Inc.
Southern Pacific Communications Company
United Press International, Inc.
United States of America
Western Union Telegraph Company

Aeronautical Radio, Inc., has no parent or subsidiary companies other than a wholly owned subsidiary. The Air Transport Association of America is an unincorporated association.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Aeronautical Radio, Inc. ("ARINC") and the Air Transport Association of America ("ATA") respectfully pray that a writ of certiorari issue to review the final judgments of the United States Court of Appeals for the District of Columbia Circuit entered in this case on June 24, 1980, and November 5, 1980, rehearing of which was denied January 27, 1981.

OPINIONS BELOW

The opinion of the court of appeals dated June 24, 1980 (App. A, pp. 1-53),[1] its Order on rehearing dated

[1] The appendices to this petition are set forth under separate cover.

November 5, 1980 (App. B, pp. 54-62), and its opinion on rehearing dated November 5, 1980 (App. C, pp. 63-66), are not yet officially reported.

The memorandum opinion and order of the Federal Communications Commission ("FCC") denying petitions for rejection, suspension, and investigation of AT&T Transmittal No. 12714, for termination of Telpak service, released June 13, 1977 (App. D, pp. 67-78), is reported at 64 F.C.C.2d 959 (1977); its memorandum opinion and order denying reconsideration released June 15, 1977 (App. E, p. 79) at 64 F.C.C.2d 958 (1977); and its memorandum opinion and order denying reconsideration released June 20, 1977 (App. F, pp. 80-81) at 65 F.C.C.2d 7 (1977).

The memorandum opinion and order of the Federal Communications Commission in Docket No. 18128 released October 1, 1976 (App. G, pp. 82-170) is reported at 61 F.C.C.2d 587 (1976); and its memorandum opinion and order on reconsideration entered June 13, 1977 (App. H, pp. 171-93) at 64 F.C.C.2d 971 (1977).

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1980, as amended on November 5, 1980 (App. I, p. 194), and its orders regarding rehearing on November 5, 1980, November 26, 1980, and January 27, 1981 (App. J, pp. 195-97). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Sections 201-209 and 214 of the Communications Act of 1934, 48 Stat. 1164, as amended, 47 U.S.C. §§ 201-

209, 214, and Sections 61.38 and 61.58 of the Rules and Regulations of the FCC, 47 C.F.R. §§ 61.38, 61.58, are set forth in Appendix K.

STATEMENT

This case raises important questions concerning both the court of appeals' unprecedented abdication of judicial review of agency actions and the proper construction of the protections of the Communications Act relating to tariff revisions by communications common carriers. Despite a massive impact of $100 million per year and the elimination of a twenty-year old bulk communications offering, the FCC found *none* of the protections of the Communications Act applicable to this tariff filing by the American Telephone and Telegraph Co. ("AT&T").

According to the FCC, AT&T's action was neither an increase in rates under Section 204 of the Act nor the withdrawal of a service under Section 214 of the Act; further, the filing raised "no question of lawfulness to investigate" under the Act. 64 F.C.C.2d 959, 965-68 (1977) (App. D, pp. 73-76). In turn, the court of appeals accepted the agency's refusal to invoke the requirements of Section 214. As to Section 204 of the Act and Section 61.38 of the FCC's Rules, the court found that the FCC's actions were "unjustifiably summary," but nonetheless dismissed the petitions for review on the ground that the FCC's refusal to reject the filing was immune from judicial review.

The result of the concurrent abdications of administrative and judicial authority is to leave the public without any effective recourse to challenge the imposition of $100 million in increased charges. Indeed, the

orders of the FCC and the court of appeals below not only deny the protections of the Communications Act to the customers in this case but also threaten to undermine those protections with respect to other AT&T services affecting numerous other communications users.

Therefore, certiorari should issue to review the propriety of the FCC's orders which unduly narrow the consumer protections of the Communications Act and of the court of appeals' decision which refuses to review the FCC's actions.

A. Background of the Telpak Offering

On January 16, 1961, AT&T filed with the Commission a tariff in which it instituted a new bulk private line service, called Telpak. This new offering was designed to meet the growing requirements of government and industry for bulk communications facilities between specified points.[2] AT&T believed that the structure of the new service would serve the public interest because Telpak would lessen the diversion of its customers to privately owned microwave systems, and would tend to concentrate communications requirements along the carrier's high-density, low-cost routes, thereby resulting in cost savings to the carrier and the public. *Telpak,* 37 F.C.C. 1111, 1114 (1964). The four initial classifications of the Telpak offering were later reduced to the present two: Telpak C (providing a spectrum equivalent to 60 voice-grade circuits), and Telpak D (equivalent to 240 voice-grade circuits).

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[2] *See* American Trucking Ass'ns v. FCC, 377 F.2d 121, 124 (D.C. Cir. 1966), *cert. denied,* 386 U.S. 943 (1967).

Following a hearing, the FCC concluded in 1964 that the Telpak C and D classifications were justified by "competitive necessity," because of the availability of private microwave as a competitive alternative to users. However, the FCC ordered further hearings on whether these offerings were compensatory, *i.e.*, whether they would bear their own costs or be a burden on other customers of the carrier.[3] The issue of compensativeness was folded into a general rate proceeding, Docket 16258, to investigate the ratemaking principles and rate relationships among AT&T's various classes of interstate service. *See* App. A, p. 6. Eventually, these proceedings led to the FCC's orders below in Docket 18128, in which the agency considered the lawfulness of the Telpak and other private line offerings, prescribed certain standards of cost and rate justification, and addresssed other questions relating to these offerings.

B. The FCC's Orders in Docket 18128

The FCC's final decision in Docket 18128 rejected the use of long run incremental costs (LRIC) and prescribed fully distributed costs (FDC) as the primary basis for justification of all tariff filings. 61 F.C.C.2d 587, 589-90, 633-49 (1976). (App. G, pp. 84-85, 128-44). From the several proposed methods of distributing costs among AT&T's various services, the agency selected FDC "Method 7" as that primarily to be used. (App. G, p. 168). The most recent FDC-7 study in Docket 18128 established not only that the Telpak offering was compensatory, but that it was earning a fully allocated return on investment of

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[3] *Id.*, 377 F.2d at 129; Telpak, 37 F.C.C. 1111, 1116, 1118 (1964).

12.6%, appreciably *higher* than AT&T's then-authorized rate of return of 8.5%, and well above the earnings of AT&T's other private line services. (App. G, p. 145). Thus, Telpak's rate of return appeared to be "within the zone of reasonableness." (App. G, p. 154).

These data should have resolved favorably the only remaining issue as to the lawfulness of Telpak, but instead the FCC reopened the issue of competitive necessity and reversed its earlier conclusion that the Telpak C and D offerings were justified on that basis. Thus, in the face of its finding that the rate of return for the Telpak offering was "within the zone of reasonableness,"[4] the FCC ordered AT&T to terminate the Telpak offering by June 8, 1977. (App. G, pp. 154, 163-64).[5]

On June 6, 1977, the Commission vacated its prior order that Telpak be terminated and withdrew its finding that the offering was not justified by competitive necessity. (App. H, p. 185). At that time, the FCC

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[4] Commissioner Washburn in dissent noted:

> "The [individual] private-line telephone rate is found to be low and illegal. TELPAK rates are held to be legal, but so low as to be discriminatory against private line. What happens if private line is raised to an acceptable legal level and TELPAK is raised to an acceptable non-discriminatory level? Will TELPAK then be too high and found illegal? Possibly, because the document on page 82 states: "*We conclude that TELPAK rates are [now] recovering the full costs associated with providing the service.*" (App. G, pp. 169-70) [Emphasis added].

[5] Although at first the FCC ordered the existing Telpak offering terminated, the agency "recognize[d] . . . the benefit to industrial, transportation and government users from a bulk communication offering," and permitted AT&T to file a "new appropriately responsive bulk offering" consistent with the FCC's decision. (App. G, p. 154).

directed that a further expedited hearing be conducted as to the lawfulness of Telpak, a hearing which would be mooted should Telpak be eliminated.[6]

Before the agency withdrew its requirement to eliminate Telpak, AT&T already had filed tariff revisions to terminate the service in compliance with the FCC's previous order. The FCC expressly authorized AT&T to withdraw this tariff revision, but AT&T did not do so.[7]

C. The Telpak Termination Tariff (Transmittal No. 12714)

Section 61.38 of the FCC's Rules, 47 C.F.R. § 61.38, requires carriers to file substantial cost, revenue and market information in support of all new tariff filings which "result[] in an increased charge to any of the carrier customers," so that the agency and the public can review the basis of any such changes in tariffs. *See Tariffs-Evidence,* 25 F.C.C.2d 957, 965, 970-71, 975 (1970). AT&T's Transmittal No. 12714, which would have terminated the Telpak offering as of June 8, 1977, included *none* of the required economic supporting materials. Moreover, although Section 214(a) of the Act expressly requires a carrier to obtain a certificate of public convenience and necessity from the FCC *before* any service may be discontinued or impaired,

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[6] That hearing has been held in abeyance pending a resolution of the status of the attempt to terminate the Telpak service. 66 F.C.C.2d 132 (1977).

[7] Although AT&T asserted that the FCC's recent orders requiring resale and shared used of Telpak circuits made bulk offerings infeasible, the FCC itself had rejected this position, as unsupported, in its decision on Resale and Shared Use, 60 F.C.C.2d 261, 285-86 (1976), *aff'd sub nom.* American Tel. & Tel. Co. v. FCC, 572 F.2d 17 (2d Cir. 1978).

AT&T never sought, and the FCC did not purport to grant, an authorization for the withdrawal of the Telpak offering.

A number of petitions requested the FCC to reject AT&T's Transmittal No. 12714 on grounds of patent unlawfulness, or to suspend and investigate the filing, permitting it to become effective only subject to an accounting order. The FCC denied all relief to aggrieved Telpak users, finding *none* of the protections of the Communications Act to be applicable despite the enormous impact, estimated at $100 million annually, to customers required to switch from the Telpak bulk service offering to single-channel private lines and other services.

With respect to Section 214, the FCC held that its earlier finding that Telpak is a "'like' service" to other private line offerings under Section 202(a) meant that the elimination of Telpak service is not a discontinuance of service. (App. D, p. 73). Inconsistently, with respect to Section 204 of the Act, the FCC held that its authority to issue accounting orders and its tariff justification requirements in Section 61.38 of its Rules *did not apply* to the withdrawal of Telpak service because that tariff revision did not change rate levels as such. (App. D, p. 74).[8] Thus, the FCC acted

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[8] The FCC's assertion that Section 204 did not apply because no "increased charge" was involved was contained in an order in Docket 20814 adopted in conjunction with the FCC's Telpak order. MPL Rate Case, 65 F.C.C.2d 295, 304 (1977). As Commissioner Washburn explained, the "two decisions are inextricably intertwined and must be considered as two parts of an integrated whole." 64 F.C.C.2d at 968 (App. D, p. 76); 65 F.C.C.2d at 306.

The FCC also purported to "waive" the obligations of Section 61.38 entirely, based *solely* on the "peculiar circumstance" that AT&T at one time thought no such information would be required. (App. D, p. 74)

to permit AT&T to discontinue the Telpak offering in favor of other, more expensive services "without even a shred of cost justification" in the record or any consideration of the public interest. (App. D, p. 76) (Commissioner Washburn, dissenting).

Accordingly, the FCC dismissed all contentions that the termination of all Telpak service, and the resulting increased charges of $100 million for substitute services, was unlawful (App. D, p. 76), and ruled that "[w]e find no question of lawfulness to investigate in AT&T's termination of Telpak." (App. D, pp. 75-76).

Petitioners then sought interim relief in the court of appeals to prevent irreparable injury pending judicial review of the FCC's denial of the petitions to reject. On July 21, 1977, the court below entered an order enjoining AT&T from "discontinuing the Telpak offering to customers served and under the terms and conditions existing" on that date, pending review of the FCC's orders. The effect of the order has been to maintain the *status quo* of the Telpak offering pending review.[9]

D. The Decision of the Court of Appeals

The court of appeals' opinion of June 24, 1980, upheld the FCC's orders with respect to the selection of FDC-7 as the primary costing methodology but reversed the FCC's refusal to reject AT&T's filing terminating the Telpak offering.[10] In response to

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[9] The court's order has not barred the effectiveness of general rate increases affecting the Telpak offering and other private line services. *See* Order of April 17, 1980.

[10] The jurisdiction of the court of appeals is founded on 28 U.S.C. §§ 2342, 2349. The court's June 24 opinion also addressed

AT&T's petition for rehearing, however, the court below withdrew its order that the FCC reject the filing terminating Telpak and, instead, concluded that it had no authority to review the FCC's orders as to Section 204 of the Act and Section 61.38 of the Rules. Order of November 5, 1980 at 4-8 (App. B, pp. 57-61); Slip op. on rehearing at 4 (App. C, p. 66).

Section 214. The court of appeals dealt only briefly with Section 214 of the Act, which prohibits a discontinuance, reduction or impairment of service absent prior authorization by the FCC. Accepting the FCC's assertion that the Telpak offering was merely a "rate discount," the court concluded that "[t]he termination of the TELPAK 'service' did not in fact discontinue, reduce, or impair any service at all." (App. A, p. 23).

In its November 5 Order, the court added some language to its prior discussion of Section 214, relying on deference to administrative interpretations of statutory language. (App. B, p. 56). ARINC and ATA's petition for rehearing, demonstrating that certain specific services now available only as part of the Telpak offering would be eliminated upon the termination of Telpak, was denied without comment. Order of November 26, 1980 (App. J, p. 195).

Section 204 and Rule 61.38. In its original opinion, the court reviewed on the merits and reversed the FCC's refusal to reject the Telpak termination tariff, because AT&T had not submitted the cost and revenue information required by the Commission's rules. (App.

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a number of issues regarding the FCC's findings as to the lawfulness of AT&T's rate levels and rate increases, and the validity of the FCC's use of its staff in multiple inconsistent roles as advocate and decisionmaker. (App. A, pp. 18-23).

A, pp. 24-28). First, the court reversed the FCC's patently erroneous assertion that no increase in rates was involved, and therefore overturned the agency's finding that the cost justification rule did not apply. (App. A, p. 25). Next, the court determined that the purported "waiver" of the rule was an abuse of discretion, in view of the important public interest in receiving the information necessary to evaluate the tariff, the "massive effect" of the tariff involving an increase in charges of $100 million per year in substitute services, and the inapplicability of the FCC's reasoning.[11]

For these reasons, the court's original decision set aside the FCC's orders and directed the agency to reject the unsupported tariff revision. However, the court left open the possibility of a new tariff terminating the Telpak offering but this time to be supported by the requisite economic justification materials. (App. A, pp. 27-28).[12]

On rehearing, however, the court below reversed itself, retracted that portion of its original opinion re-

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[11] Actually, the FCC rationale addressed by the court of appeals is not stated in the FCC's orders at all, but was merely a *post hoc* rationale created by FCC appellate counsel. The FCC's only stated rationale for waiver was the "peculiar circumstance" that AT&T at one time thought no economic justification would be required. (App. D, p. 74). In any event, the court concluded that even the *post hoc* rationale put forth by FCC counsel did not justify the FCC's actions. (App. A, pp. 26-27).

[12] In view of the circumstances of the case, the court's June 24 decision also continued the existing injunction for up to 120 days to permit the parties to comply with its rulings. This period was later extended by the court until February 27, 1981. Order of Oct. 31, 1980.

garding Section 204 and Rule 61.38, and ruled for the first time that it lacks authority to review the FCC's orders refusing to reject the Telpak termination filing. The court held to its view that the FCC's actions were "unjustifiably summary" (App. C, p. 65), but ruled that, under *Southern Railway v. Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979), as extended by the court of appeals in *Papago Tribal Utility Authority v. FERC*, 628 F.2d 235 (D.C. Cir. 1980), *cert. denied*, 49 U.S.L.W. 3443 (U.S. Dec 15, 1980), the court had no jurisdiction to review either the FCC's refusal to reject the Telpak filing, or the FCC's waiver of Section 61.38 of its Rules dispensing with any economic justification data whatsoever. (App. B, pp. 57-61). In so ruling, the court admittedly extended the holdings of these earlier cases to very different circumstances. (App. B, p. 60, 61; App. C, p. 66).

By Order of January 27, 1981, the court denied a petition for rehearing by the United States regarding the denial of judicial review. (App. J, pp. 196-97).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision Barring Judicial Review of the FCC's Refusal to Reject Patently Unlawful Tariff Filings Is Unprecedented and in Conflict With Decisions of This and Other Courts

The court of appeals' holding that the FCC's orders refusing to reject even patently unlawful tariff filings are immune from judicial review is extraordinary and unprecedented. Not only is it inconsistent with the broad principles of judicial review, but it misperceives the true nature of the FCC's actions below, which resolved with finality important questions concerning the availability to aggrieved customers of statutory pro-

tections against improper conduct by regulated common carriers.

This Court long ago settled that the courts have no basis for judicial review of agency decisions regarding the *suspension* of new tariff filings. *Arrow Transportation Co. v. Southern Ry.*, 372 U.S. 658 (1963). The Court's recent decision in *Southern Railway*, 442 U.S. 444, merely reaffirms the principles of *Arrow* and applies its holding to preclude judicial review of an agency's decision whether to institute an *investigation* of a new filing at the outset.

The issue in this case concerns *neither* suspension nor investigation, and thus is not controlled by either of those decisions. Rather, the issue here is whether an agency's refusal to *reject* a tariff filing, which is patently in violation of statutory or regulatory requirements, is immune from judicial review.

Well cognizant of this Court's *Arrow* rule regarding suspension decisions, a long line of appellate decisions in the District of Columbia Circuit [13] and in other circuits [14] has established that agency decisions refusing to reject tariff filings on grounds of patent invalidity are judicially reviewable at least to assure that

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[13] *See, e.g.*, American Broadcasting Cos. v. FCC, No. 78-1968 (D.C. Cir. April 28, 1980); Papago Tribal Utility Auth. v. FERC, 610 F.2d 914 (D.C. Cir. 1979); City of Groton v. FERC, 584 F.2d 1067, 1070 (D.C. Cir. 1978); Municipal Light Boards v. FPC, 450 F.2d 1341, 1345 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972); Associated Press v. FCC, 448 F.2d 1095, 1103 (D.C. Cir. 1971).

[14] International Business Machines Corp. v. FCC, 570 F.2d 452 (2d Cir. 1978); Southern Natural Gas Co. v. FPC, 547 F.2d 826 (5th Cir. 1977).

the agency has not acted arbitrarily or in violation of its statutory duties or its own regulations:

> Thus, an agency will reject a tariff that conflicts with a *statute, agency regulation* or order, or with a rate fixed in a contract sanctioned by statute; similarly, a tariff will be rejected if it is unlawful without prior agency approval, and approval has not been obtained. *In such cases the refusal of an agency to reject the tariff may be reviewed by the courts.* [15]

Accordingly, until recently, both the duty of the agency to reject patently unlawful tariff filings and the authority of the court of appeals to review refusals to reject such filings have been clearly established. Indeed, in its principal brief in the court below, the FCC did not even question the jurisdiction of the court of appeals but devoted itself entirely to a defense of its actions on the merits. Similarly, the decision of the court below on June 24, 1980, addressed itself entirely to the merits of the FCC's actions, affirming in part but reversing as arbitrary and capricious the FCC's failure to reject the tariff filing for non-compliance with Section 61.38 of the Rules.

On rehearing, however, the court below adopted a radically different approach both to the agency's duties respecting tariff filings and to judicial review. Extending the principles it had first announced in *Papago*

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[15] *Associated Press, supra,* 448 F.2d at 1103 (emphasis added), *citing* Permian Basin Area Rate Cases, 390 U.S. 747 (1968); FPC v. Hunt, 376 U.S. 515 (1964); United Gas Pipe Line Co. v. Mobile Gas Corp., 350 U.S. 332 (1956); Isbrandtsen Co. v. United States, 211 F.2d 51 (D.C. Cir.), *cert. denied,* 347 U.S. 990 (1954); Seatrain Lines, Inc. v. United States, 168 F. Supp. 819 (S.D.N.Y. 1958).

Tribal Utility Authority v. FERC, 628 F.2d 235 (D.C. Cir. 1980), *cert. denied,* 49 U.S.L.W. 3443 (U.S. Dec. 15, 1980), the court held that agency actions refusing to reject tariff filings are beyond the scope of judicial review, based on the erroneous dictum in *Papago* that regulatory agencies "owe[] no one the *duty* to reject a rate filing, even if it is patently invalid." 628 F.2d at 247.

The court of appeals below effectively has overruled its earlier precedents and precluded *any* judicial review of the FCC's orders regarding even patently invalid tariff filings. Under the new rule, parties subjected to patently illegal tariffs have no recourse to judicial review—even if they might suffer irreparable injury in the interim until the completion of complaint procedures. (App. B, p. 61). Because virtually any objection to any outstanding tariff could be framed as a complaint, however inadequate the remedy, the mere existence of a statutory complaint procedure would be enough to preclude any judicial review. (App. B, p. 59-60; App. C, p. 66). Although the court's concluding statement asserts that "we cannot review the Commission's orders until the statutory complaint procedures have been followed" (App. B, p. 61), it is clear that the court's decision here is *precluding,* not merely *postponing* judicial review of the refusal to reject itself.

The court of appeals' abnegation of judicial review merits review by this Court, because that court has not only misapplied this Court's *Southern Railway* decision but has departed from its own prior decisions and from the proper principles of judicial review. This Court in *Abbott Laboratories v. Gardner,* 387 U.S. 136, 149 (1967), has established that judicial review is proper with respect to purely legal questions. The

FCC's orders in this case raise such legal questions, including the FCC's assertions that it has *no authority* to issue an accounting order because AT&T's filing withdrawing Telpak does not represent an "increased charge" within the meaning of Section 204 of the Act. This is not a case where the agency's order "decides nothing concerning the merits of the case [but] merely reserves the issues pending a hearing." *Papago,* 628 F.2d at 240; *see Southern Railway,* 442 U.S. at 452-53. Nor do the FCC's actions serve "only to initiate the proceedings" and have no "legal or practical effect except to impose upon [petitioners] the burden of responding to the charges made against it." *FTC v. Standard Oil Co.,* 101 S. Ct. 488, 494 (1980). Those considerations bear no relation to the FCC's orders in this case which resolved important legal issues and reserved no issue of lawfulness pending a hearing.

Contrary to the view of the court below, *Southern Railway* does not bar judicial review under these circumstances. The holding of *Southern Railway* extends no further than the narrow issue of the reviewability of an agency's decision whether to initiate an investigation of a tariff filing on its own. The relief sought there was an investigation. This Court ruled that a no-investigation decision is not judicially reviewable, because the order is not a decision on the merits and does not affect ultimate rights, and because essentially the same relief—*i.e.,* an investigation—is available pursuant to the complaint procedures. 442 U.S. at 444-45. That holding essentially parallels the Court's *Arrow* rule that discretionary suspension decisions are not reviewable.

The court of appeals' earlier decision in *Papago* also differs significantly from the present case. The

specific issue in *Papago* was simple enough. A tariff filing increasing rates was accompanied by economic material which, though in "substantial compliance" with the filing rules, 628 F.2d at 237, allegedly contained certain erroneous assumptions or deficiencies. In response, the FERC declined to reject the filing but suspended it for the maximum period and set the disputed factual allegations for resolution at a "full hearing." *Id.* at 239. On appeal, the court concluded that the pendency of such on-going proceedings before the agency considering the same factual questions presented in the appeal rendered the FERC's order non-final. Although the court's opinion ranged far beyond the narrow question presented to establish a broad rule of non-reviewability, most of that discussion is pure dicta.[16] Even that court, however, recognized that its

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[16] The *Papago* panel reviewed and "harmonized" contrary appellate opinions which permitted judicial review, by effectively reading them out of existence, asserting for example that *Associated Press* "overstates the authority of the courts to review agency decisions." 628 F.2d at 246. Although *Associated Press* established that courts have authority to review agency orders that violate a statutory duty, *Papago* replies that agencies "owe[ ] no one the *duty*" to reject tariff filings even if patently invalid and the agency violates a statutory duty in accepting it. *Id.* at 247 & n.30. This assertion in *Papago* is not merely unprecedented but is entirely unnecessary to the decision of the case presented there.

Although *Papago's* broad principle of non-reviewability thus conflicts with prior precedent, that principle is essentially *dicta* in that case. *Papago* accordingly was inappropriate for review on certiorari. *See generally* Scalia, *Vermont Yankee: The APA, the D.C. Circuit and the Supreme Court*, 1978 SUP. CT. REV. 345, 356-57, 372-74. However, because the court below essentially adopted *in toto* the rationale of *Papago*, this case presents a more appropriate vehicle to consider and decide the important questions regarding the scope of judicial review.

prohibition against judicial review would not apply to "orders that accept tariff filings and allow them to take effect *without investigation or refund obligation* [*because*] [*s*]*uch orders would present different questions of reviewability.*" *Id.*, 628 F.2d at 238, n.8 (emphasis added). The court below has now read out of existence that express limitation in *Papago*. (App. B, pp. 59-60; App. C, p. 66).

The decision below thus is open to serious question. Relying *solely* on the existence of a statutory complaint mechanism, the court ruled that "[t]he factual differences between [*Papago* and *Southern Railway*] and this case are differences without a distinction." (App. C, p. 66). Yet, the court of appeals' superficial analysis ignores the following:

1. This case raises, not contested issues of fact that have been set for full hearing as in *Papago*, but instead threshold issues of law. The FCC has held that AT&T's filing does not represent an "increased charge" within the meaning of Section 204 of the Act and Section 61.38 of its Rules, and therefore that it does not have the authority under Section 204 to issue an order to account for increased revenues. Those are final legal rulings by the agency, not merely a disputed factual contention susceptible of resolution in an ongoing hearing.

2. The FCC's orders below reflect a clear (though of course improper) prejudgment of the merits of the Telpak termination tariff. In response to petitioners' challenges to AT&T's tariff revision, the FCC did not institute a hearing on these challenges (as in *Papago*), nor did it find in its discretion that an immediate hearing would not be necessary (as in *Southern Rail-*

way). Instead, it held sweepingly that "we find no question of lawfulness to investigate" in the termination of Telpak. 64 F.C.C.2d at 967-68. That holding can *only* be read as a ruling on the merits. The court of appeals erred in failing to review those prejudicial determinations.[17]

3. The complaint remedy is not an effective recourse for the aggrieved Telpak customers in view of the FCC's orders. The reality is that the FCC not only has already ruled against them on the merits, but also has denied the public access to the economic materials described by the FCC as "basic to the formulation of the essential regulatory judgments" regarding increased charges. *Tariffs-Evidence, supra,* 25 F.C.C.2d at 965. Given the loss of the bulk Telpak service and the combining of the bulk and non-bulk markets, new complaints against all the substitute single-channel services on behalf of the terminated bulk market would require an impossible unscrambling of the omelette of overall costing and pricing of all such single channel services.

4. The resulting damages are not a simple matter of calculating the increased cost of substitute services because the impact of Telpak's termination varies for each customer depending on the configuration of its

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[17] "Sections 402(a) and 2342 contain sufficient play to permit judicial intervention where it seems that an agency has departed from the normal course of its proceedings to make gratuitous prejudicial determinations or has otherwise cloaked the kinds of actions and harms normally associated with orders in nonreviewable garb." American Broadcasting Cos. v. FCC, No. 79-1261, Slip op. at 8 (D.C. Cir. Oct. 9, 1980), *citing* American Tel. & Tel. Co. v. FCC, 602 F.2d 401, 409 (D.C. Cir. 1979).

network, the mix of facilities required, the density of channels, and the location of the requirements. Even for a single customer, these factors are constantly changing and, absent a bulk offering such as Telpak, could not be recreated. Even the FCC now virtually concedes the inadequacy of such means of relief.[18] Moreover, there is no way the intrastate "splashover" effect of the termination of the Telpak service could be remedied by the complaint procedure. As ARINC and ATA explained to the court below, the termination of the interstate Telpak offering will result in significant increases in charges for *intrastate* service, over which the FCC has no jurisdiction. Where petitioners have no remedy before the FCC to challenge the increased charges resulting from its actions, *see FPC v. Hunt*, 376 U.S. 515, 524 (1964); *Papago, supra*, 628 F.2d at 241 n.15, the court of appeals is patently incorrect to refuse judicial review in deference to a nonexistent complaint remedy.

Under all these circumstances, the court of appeals' assertion that the Communications Act's complaint mechanism is "a realistic remedy for Telpak customers" because "customers can allege that the remaining private line rates are unlawfully high" simply blinks reality. (App. B, p. 60). If Telpak customers were to file a complaint, as urged by the court below,

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[18] "Telpak no longer exists if the tariff revisions become effective; and a successful complaint about the level of single-circuit rates will not necessarily result in restoration of a bulk discount." Response of FCC in Opposition to Petition of United States for Rehearing at 7-8 (filed December 22, 1980, in the court of appeals). The FCC, however, would have the court deny judicial review even though the complaint remedy could not provide adequate relief to petitioners.

they would face not merely the shift in the burden of proof and the limitation of remedy to actual damages, *see id.; Southern Railway,* 442 U.S. at 454-55 & n.8, but also must face the absence of advance discovery, the futility of recreating theoretical markets and costs for AT&T, and the undeniable reality that the *FCC has already ruled against them on the merits.* The decision below, making the *mere existence* of a complaint structure an absolute bar to judicial review of agency tariff decisions, has elevated that mechanism to be an end in itself regardless of its complete futility.

Thus, the court of appeals' decision presents a novel and important question for this Court to decide: whether the judicial review provisions of the Communications Act should be construed so as to preclude any judicial review of the FCC's refusal to reject a tariff filing patently in violation of applicable legal requirements? That such a preclusion of judicial review has an immediate and continuing impact is evident from the dismissal of at least three other petitions for review of refusals to reject since the court's November 5, 1980, decision below.[19]

II. The FCC's Decision Below Improperly Removes Regulatory Oversight From Tariffs Withdrawing Current Service Offerings Contrary to the Requirements of the Communications Act

The FCC's determination that the withdrawal of the Telpak offering is *neither* a discontinuance, im-

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[19] Western Union Int'l, Inc. v. FCC, No. 78-1697 (D.C. Cir. Nov. 18, 1980); Order, Western Union Tel. Co. v. FCC, No. 78-1955 (D.C. Cir. Jan. 15, 1981); Order, MCI Telecommunications Corp. v. FCC, No. 80-1772 (D.C. Cir. Jan. 12, 1981). Adding to the confusion, the opinion in *Western Union Int'l* denying review cited earlier authority that *permitted* judicial review in such a case.

pairment, or reduction of service requiring prior agency approval under Section 214, *nor* a rate increase subject to the requirements of Section 204 of the Act and Section 61.38 of the FCC's Rules, has in effect created a new category of tariff filing exempt from effective regulation under the Act. Despite the massive impact of $100 million increased charges for substitute services, the FCC determined that somehow none of the protections of the Communications Act—such as cost justification, an accounting order or prior agency approval of service reduction—even applied to this tariff filing. (App. D, pp. 72-74).

A. *The Court of Appeals' Narrow Interpretation of Section 214 Is Inconsistent With Other Interpretations of That Provision and Opens the Door to Unregulated Termination of Tariff Offerings*

Section 214 prohibits a discontinuance, reduction, or impairment of service without prior determination by the FCC that it would be in the public interest. In this case, however, the FCC has never considered the public interest under Section 214, because it has construed Section 214 as inapplicable.

The holding that the withdrawal of the Telpak tariff offering did not impair any service to AT&T's customers is based on several broad premises which are inconsistent with other interpretations of Section 214 and which open the door to a severe diminution of the statutory protections intended by Congress.

First, the refusal to apply Section 214 to Telpak is premised on an inaccurate interpretation of the facts. In an important respect, ARINC and ATA will lose a portion of their present private line service under the Telpak offering. As explained to the court

below, ¶ 2.2.2(C) of AT&T's Tariff F.C.C. No. 260 restricts the shared use of switched private line service, a restriction not contained in the Telpak service. That service, the use of such switching facilities, will be prohibited to ARINC upon the elimination of Telpak —yet ARINC has been denied the express protections of Section 214.[20]

Second, that construction is inconsistent with long-standing recognitions by both the FCC and the court of appeals that Telpak "has characteristics distinct from other private line services."[21] The FCC even represented to the Court of Appeals for the Second Circuit that "*[i]f AT&T does not want to allow resale or sharing of Telpak, it can apply to the Commission for permission under Section 214 to discontinue the*

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[20] Additionally, AT&T conceded in a recent tariff filing that "there are several existing customers being provided 230.4 Kbps wideband data services under TELPAK. Current AT&T tariffs provide no satisfactory alternatives to these customers." AT&T Transmittal No. 13533, Sept. 22, 1980. Plainly, the elimination of the Telpak service will affect these customers.

Although AT&T is proposing a limited substitute service, that service will be available in certain cities only, instead of the current nationwide availability. The FCC has held that a new geographical limitation on an existing service, even in areas where no one is using the service, is a reduction in service requiring Section 214 authorization. AT&T (Docket No. 20690), 69 F.C.C.2d 1696 (1978).

[21] Resale and Shared Use, 60 F.C.C.2d 261, 264 (1976); *see* American Trucking Ass'ns v. FCC, 377 F.2d 121, 133-34 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967). The FCC has even distinguished between "separate Service or facilities offerings, *e.g.*, Telpak *vis-a-vis* Series 2000-3000 [single channel private line service]." AT&T (Series 7000 Rejection), 67 F.C.C.2d 1134, 1160 n.23 (1978).

service." [22] These representations to that court squared fully with the FCC's consistent requirement that Telpak be costed as a separate service, and the cost studies in the record below demonstrating that Telpak enjoyed a rate of return well above AT&T's other private line services, according to the FCC-prescribed methodology. The parameters of the Telpak service are in fact so distinct that its elimination will require a complete reconfiguration of the airline industry's current communication network. *See* Affidavits of Dr. George F. Mansur, May 4, 1977, and Nov. 24, 1980.

Finally, the FCC's assertion that Section 214 does not apply is inconsistent with its own prior precedent. *Graphnet Systems, Inc.*, 63 F.C.C.2d 402 (1977), recognized "the technical and economical advantages to large volume users" and squarely held that flat rate overseas private line service "*cannot be curtailed* [*in favor of usage-sensitive shared services*] *without appropriate authorization from the Commission pursuant to Section 214.*" *Id.* at 410 n.9 (emphasis added). Similarly, the FCC has held, and the Second Circuit affirmed, that a "reseller" or broker of communications services must have Section 214 authorization to terminate its own resale service, even though the same services and facilities of the underlying carrier would remain available.[23] That holding contradicts the FCC's assertion below that Section 214 does not apply if it

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[22] Opposition of FCC to Motion of AT&T for Stay Pending Judicial Review at 20 (March 17, 1977), American Tel. & Tel. Co. v. FCC, No. 77-4057 (2d Cir.) (emphasis added).

[23] Resale and Shared Use, 60 F.C.C.2d 261, 313 (1976), *aff'd sub nom.* American Tel. & Tel. Co. v. FCC, *supra*, 572 F.2d at 25.

can be said that the same or similar "service" or facilities remain available.

Together, the FCC and the court below have opened the door to the unilateral withdrawal of bulk communications offerings, such as with Telpak, without any showing of public interest or without "a shred of cost justification" in the record. (App. D, p. 76) (Commissioner Washburn, dissenting). Such an unauthorized deregulation of a class of tariff filings from the protections of Sections 204 and 214 of the Communications Act raises serious questions of statutory construction meriting review by this Court. *See FPC v. Texaco Inc.*, 417 U.S. 380 (1974). Whether the withdrawal of the volume nature of telecommunications services in favor of single channel services is within the protection of Section 214 is an important question which has never been decided by this Court. The proper interpretation of Section 214 is crucial not only with respect to Telpak, but relates to other important matters as well, such as the FCC's recent decision that WATS is merely a bulk version of AT&T's ordinary long distance service.[24]

B. *The Court of Appeals' Abdication of Authority Over the Withdrawal of Current Service Offerings, if Not Reversed, Will Have a Broad Adverse Impact on the Intended Protections of the Communications Act*

The impact of the FCC's holding that neither Section 204 nor Section 214 of the Act apply to the with-

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[24] AT&T (Docket 21402), 70 F.C.C.2d 593 (1978), *recon. denied*, 79 F.C.C.2d 10 (1980), *petitions for review pending sub nom.* Ad Hoc Telecommunications Users Comm. v. FCC, No. 80-1785 (D.C. Cir.).

drawal of a bulk offering extends well beyond the FCC's intended victim, the Telpak offering, and, unless reversed, will continue to impair the public's protection against the withdrawal of services other than Telpak.

Perhaps the most visible injury to the public interest —apart from the termination of the Telpak offering— may arise in the context of AT&T's widely utilized WATS offering. Wide Area Telephone Service ("WATS") is a public switched service permitting users to make calls (Outward WATS) or to receive calls (Inward WATS or "800" Service) within a given geographical area for a flat rate.

On September 15, 1980, AT&T filed revisions to its WATS tariff to comply with the FCC's prior orders rejecting the current WATS tariff.[25] In connection with those revisions, which will result in substantially increased charges to some users, AT&T was required to submit forty volumes containing some 17,000 pages of information and analyses pursuant to Section 61.38 in support of a revised WATS tariff.[26]

However, in terms reminiscent of its present orders regarding Telpak, the FCC earlier determined that

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[25] *See* WATS Rejection Order, 66 F.C.C.2d 9 (1977), *recon. denied*, 69 F.C.C.2d 1672 (1978).

[26] In its orders below the FCC made clear with respect to the Telpak service that if AT&T sought to revise rather than eliminate the Telpak tariff such economic justification under Section 61.38 would be required. (App. D, p. 74) ("if AT&T chooses to file another bulk rate offering the requirements of Section 61.38 must be fully met").

WATS is a "like communication service" to MTS (the ordinary "long distance" service).[27]

> [T]he WATS services are bulk discounted service offerings which differ in no material functional respect from MTS use of the public switched network. . . . WATS and MTS employ the same public switched network and offer the same telephone calling capability from the standpoint of the customer.[28]

The FCC's analysis of WATS, if it prevails,[29] may well bring WATS within the scope of its *Telpak* orders. If AT&T should choose to eliminate rather than revise its WATS tariff, the FCC's orders and the court of appeals' decision in this case, if undisturbed, could preclude any effective relief for aggrieved WATS customers.

Although it would be theoretically possible for former WATS users to file complaints challenging AT&T's MTS tariff, an investigation of MTS which inquired only into the overall rate of return for all MTS users, or which put upon former WATS users the impossible burden of recreating a theoretical market, cost, and rate level for AT&T to charge former WATS users for MTS services, would be just as futile for former WATS users switching to MTS as for Telpak users in the present situation.

Thus, although a revision of WATS offering requires some 17,000 pages of documentation and lengthy agency

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[27] AT&T (Docket 21402), *supra*, 70 F.C.C.2d 593, 79 F.C.C.2d 10.

[28] *Id.*, 79 F.C.C.2d at 11, 12. *See also* 70 F.C.C.2d at 604 n.15.

[29] ARINC and ATA have sought review of the FCC's determination that WATS is "like" MTS. *See* note 24 *supra*.

proceedings, the ruling of the FCC and the court of appeals, if left undisturbed, would leave AT&T at liberty to attempt to terminate the WATS tariff (just as it has with Telpak) with *no* consideration of the public interest, with *no* economic justification data, with *no* judicial review, and with *no* effective complaint remedy. Such an incongruous and widesweeping construction of the Communications Act raises serious questions meriting review by this Court.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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